No. 89-1782

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS, STATE OF ALASKA,
Petitioner,

v.

NATIVE VILLAGE OF NOATAK AND CIRCLE VILLAGE,
Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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SUPPLEMENTAL BRIEF IN OPPOSITION

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September 18, 1990

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. THE STATE NOW ADMITS THAT RESPONDENT NATIVE VILLAGE OF NOATAK HAS TRIBAL STATUS AND THEREFORE THE RIGHT TO SUE IN FEDERAL COURT UNDER 28 U.S.C. § 1362

In our brief in opposition to the petition for a writ of certiorari, we pointed out that the position of Alaska's judicial and executive branches on the question of tribal status was in the midst of a period of rapid transition, thus making review premature and inappropriate in this case. Brief in Opposition at 8. The

latest shift in the State's position underscores this point.

On September 10, 1990, the Governor of Alaska issued anAdministrative Order treating as tribes those Alaska Native Villages which could meet federal criteria for tribal recognition. The order is attached as Appendix A. The attachment to the order also provides that all such tribes "would almost certainly have . . . the right to sue in federal court." Attachment to order, Appendix A at 4a. (In its petition for certiorari, the State had acknowledged "that . . . Noatak probably could meet [such federal recognition] . . . criteria".) Pet. at 4 n.4.

Thus, the State executive branch has now effectively agreed that Noatak has tribal status and the right to bring suit in federal court under 28 U.S.C. § 1362 and has thereby implicitly withdrawn, or rendered moot, the second question presented for review. The State's belated but welcome admission as to the correctness of the Ninth Circuit's decision on the issue of tribal status is likewise the view of the United States. *See* Brief of the United States as Amicus Curiae filed in August 1990 in *Puckett v. Tyonek*, U.S. Supreme Court Case No. 89-609.

II. THE STATE'S RECENT ADMISSION THAT NATIVE VILLAGES HAVE TRIBAL STATUS IS FURTHER GROUND FOR DENYING CERTIORARI ON THE THIRD QUESTION PRESENTED, i.e., THE SUBSTANTIALITY OF THE FEDERAL CLAIMS

The State conceded in its petition that the question as to the substantiality of the federal claims does not satisfy the certiorari criteria of this Court's Rule 17. Pet. at 16 n. 16. In any event these claims will be tested on remand to the district court should the State

elect to seek dismissal for failure to state a claim upon which relief can be granted.

The Governor's recent agreement to treat Native Villages as tribes, however, presents an additional ground for denying certiorari on the question of substantiality. By his administrative order, the Governor has implicitly overruled the earlier Attorney General's opinions concluding that Native Villages were not tribes but racial entities and therefore State aid to Native Councils under the State Revenue Sharing Act (Alaska Statute § 29.89.050) was discriminatory and unconstitutional (Pet. at 2). These earlier opinions formed the basis of the Petitioner's administrative revision of this Act, which in turn became the subject of the Villages complaint herein.

The Governor's administrative order implies that there was no constitutional basis for the petitioner's administrative revision of the State Revenue Sharing Act in the first instance, making it highly unlikely that similar actions will be taken in the future, thus eliminating the necessity for review.

CONCLUSION

For the foregoing reasons, and those previously presented, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

MEMORANDUM

TO: All Commissioners DATE: September 10, 1990

FROM: Steve Cowper, Governor SUBJECT: Administrative Order No. 123 Re: State's Tribal Status Policy

Attached for your information is Administrative Order Number 123 establishing the State's Tribal Status Policy. The State of Alaska has been informally operating under this policy and this Administrative Order formally implements it. Please forward copies of this order to the appropriate divisions in your department and to the directors of your regional office.

If you have any questions on this Administrative Order, please contact my Special Staff Assistant, Mike Irwin, at 465-3500.

cc: Governor's Regional Offices
Special Staff Assistants
Native Policy Committee

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

ADMINISTRATIVE ORDER NO. 123

I, Steve Cowper, Governor of the State of Alaska, under the authority granted by Article III of the Alaska constitution and by Alaska Statute 44.17.060, hereby establish the Policy of the State of Alaska on Existence of Tribes in Alaska.

In order to clarify the State's position and to insure that Alaskan Natives receive the recognition to which they are entitled, the State adopts the following policy on recognition of tribes in Alaska.

Tribes exist in Alaska. The State believes that Native Alaskan tribes exist within Alaska, both on our only federally recognized reservation (the Metlakatla Indian Community on Annette Island), and in other communities. We contend that many Native Alaskan groups could qualify for tribal recognition under federal law, although some would not. The State realizes that the existing federal tribal acknowledgement process is complex and time-consuming, and in many instances is not well suited for use by Alaskan Native tribes. We think that it would be unfair and overly legalistic for the state to treat as tribes only those Native groups that have actually gone through the detailed and complicated federal recognition process. The State believes that it should treat as a tribe any Alaskan Native group that could qualify, even if it has not actually gone through the formal process. The State will treat as a tribe any Alaskan Native group that meets the common sense of the word. For example, we believe that the Native residents of a majority of communities listed as a Native village in the Alaska Native Claims Settlement Act (ANCSA) should be considered a tribe. Although some Native organizations are not tribes—it would be contrary to the

intent of Congress, for example, to treat ANCSA corporations as tribes—we believe Native groups should be accorded the dignity of being treated as tribes whenever possible.

The powers of Alaskan Native tribes. All tribes have some powers, whether they occupy reservations or not. The extent of the powers of off-reservation tribes is not fully defined in the law, but it includes the right to define the tribe's own membership and to regulate its own purely internal affairs. A tribe will also have any powers expressly granted to it by the federal government, such as in the Indian Child Welfare Act, whether or not it occupies a reservation.

The State also believes that certain powers belong only to tribes that occupy reservations. For example, outside of a reservation, a tribe may not exclude non-members or regulate their affairs, or regulate resources that belong to all Alaskans, such as fish and game, or give its members immunity from state laws. When the state treats a Native group outside of a reservation as a tribe, it does not recognize that the tribe has the governmental powers of a tribe on a reservation. Whether governmental powers exist in a tribe in any particular instance is a completely separate question from tribal status.

This order takes effect on the 10th, day of September, 1990.

DATED at Juneau, Alaska, this 10th day of September, 1990.

/s/ Steve Cowper
Steve Cowper
Governor

Attachment to
Administrative Order No. 123

PROBABLE POWERS OF AN OFF-RESERVATION TRIBE

Each tribe would almost certainly have these powers:

- the power to define its own membership
- the power to control its own internal affairs [It is unclear what this category entails, but it probably includes selection of its own officers and control of its own finances]
- the right to sue in federal court
- sovereign immunity as to some matters, e.g., those directly affecting purely tribal matters [Note that the Alaska Supreme Court may disagree since it has tied sovereign immunity to sovereign powers of a government]

An off-reservation tribe almost certainly would not have the following powers in the absence of a reservation or other area defined as Indian country.

- authority to exclude non-members
- authority to condemn property
- authority to manage wildlife, including hunting and fishing
- regulatory authority over non-members without their consent
- judicial authority over non-members without their consent
- taxation authority over non-members without their consent
- immunity from state laws

There is a sizeable grey area, in which an off-reservation tribe may have an argument for its own authority, but where we believe the better legal view is that they lack the power outside of Indian country:

- judicial authority, including criminal misdemeanor authority, over their own members
- authority to tax their own members
- authority over domestic relations (marriage, divorce, child custody); in addition to authority already granted by Congress over children's matters in the Indian Child Welfare Act
- sovereign immunity for some matters, such as torts committed away from the community and contracts entered into for business or proprietary reasons

This listing of powers does not reflect where federal law may delegate powers in the absence of Indian country, such as in the Indian Child Welfare Act and in the federal Indian liquor laws. It is still possible for Congress to grant or clarify off-reservation tribal powers in the future, for example, affirmatively permitting tribal judicial authority over misdemeanors by members.

This listing also does not reflect possible policy preferences by the state. For example, the state could choose not to contest—or could even advocate in Congress—expanding the Indian liquor laws or tribal authority over member misdemeanants, or exercise of some governmental powers by tribes over their own members, such as taxation, judicial authority, or education.